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# Report from Washington

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## Executive Order Issued to Secure the United States Bulk-Power System

May 8, 2020

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### Introduction

On May 1, 2020, President Trump issued an Executive Order on Securing the United States Bulk-Power System (the “Executive Order”), declaring a national emergency with respect to the bulk-power system<sup>1</sup> and authorizing the U.S. Secretary of Energy (the “Energy Secretary”) to take immediate steps to protect its security, integrity, and reliability. The Executive Order prohibits the sourcing of certain electric equipment from “foreign adversaries” if it would pose risks to U.S. national security. This order also requires the Energy Secretary, in consultation with other agencies as appropriate, to identify bulk-power system electric equipment already installed within U.S. energy infrastructure and develop recommendations to mitigate the risks posed by such equipment. Lastly, the Executive Order establishes the Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (the “Task Force”) to develop energy equipment procurement policies emphasizing national security considerations.

Citing concerns related to the “unrestricted foreign supply” of bulk-power system electric equipment, the Executive Order prohibits the acquisition, importation, transfer, or installation of such equipment if (i) the equipment was “designed, developed, manufactured, or supplied” by a “foreign adversary”; and (ii) the use of such equipment would raise significant national security concerns. While the Executive Order does not specifically define certain entities or governments as “foreign adversaries,” it does authorize the Energy Secretary to issue regulations for doing so. The Energy Secretary may also publish rules

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<sup>1</sup> The definition of “bulk-power system” used in the Executive Order is consistent with that of Section 215 of the Federal Power Act, which defines the term as “(i) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (ii) electric energy from generation facilities needed to maintain transmission reliability.” The Executive Order specifies that “bulk-power systems” include transmission lines rated at 69,000 volts (69 kV) or more, but do not include facilities used in the local distribution of electric energy.

identifying particular equipment or countries warranting additional scrutiny, and establishing procedures to license and mitigate transactions that would otherwise be prohibited. These regulations are to be published in consultation with the Secretary of Defense, Secretary of Homeland Security, and the Director of National Intelligence by September 2020.

The Executive Order also mandates the Energy Secretary, in consultation with other relevant U.S. government agencies, to identify currently installed bulk-power system electric equipment designed, developed, manufactured, or supplied by “foreign adversaries” that may pose significant threats to U.S. national security and develop recommendations to “identify, isolate, monitor, or replace” such items as soon as practicable. Moreover, the Energy Secretary may, but is not required to, establish criteria for recognizing particular equipment and vendors that are pre-qualified for future acquisition, importation, transfer, or installation within the U.S. bulk-power system.

Finally, the Executive Order establishes the Task Force, which will be chaired by the Energy Secretary and comprised of the Secretary of Defense, Secretary of the Interior, Secretary of Commerce, Secretary of Homeland Security, the Director of National Intelligence, the Director of the Office of Management and Budget, and other agency heads as may be designated. The Task Force will develop energy infrastructure procurement policies and procedures for submission to the Federal Acquisition Regulatory Council and evaluate methods of incorporating national security considerations into energy security and cybersecurity policymaking in consultation with the Electricity Subsector Coordinating Council and the Oil and Natural Gas Subsector Coordinating Council.

### Key Takeaways

- The Executive Order shares similarities with President Trump’s Executive Order on Securing the Information and Communications Technology and Services Supply Chain, issued in May 2019. Both orders demonstrate the Trump Administration’s sensitivity toward the critical infrastructure supply chain and their potential impact on U.S. national security.
- The Executive Order may be intended to limit Chinese access to and industrial equipment sales into the U.S. bulk-power system. Chinese companies are key equipment suppliers for the U.S. power sector and the Trump Administration has consistently identified China as a threat to U.S. national security.
- The Executive Order effectively authorizes the establishment of equipment and vendor “blacklists” from which U.S.-based utilities will be prohibited from procuring

equipment. This could impact investors in the U.S. critical infrastructure space if their underlying investment thesis relies on buildouts or upgrades using Chinese technology that tends to be more affordable than Western alternatives.

- The Executive Order calls for the identification of existing bulk-power system equipment that may be problematic, as well as the development of recommendations to mitigate the risks posed by such equipment. These measures could include the isolation or replacement of such items, potentially at the owner's expense.
- The Executive Order establishes a multiagency review process for licensing and mitigating certain transactions involving U.S. bulk-power system electric equipment; however, it remains uncertain how this process may interact with the review process of the Committee on Foreign Investment in the United States ("CFIUS"). The Executive Order confirms areas of national security interest for the U.S. government, which are already areas of heightened scrutiny in CFIUS reviews, though CFIUS has its own jurisdictional authority independent of this order.

## Conclusion

This Executive Order authorizes the U.S. Secretary of Energy to work with other federal agencies and energy industry groups to develop processes and procedures to secure the United States bulk-power system. While the Executive Order applies to those transactions initiated after its publication, the timeline for its enforcement may depend, in part, on the publication of certain implementing regulations, which is to take place by September 2020. Simpson Thacher & Bartlett continues to monitor developments regarding the Executive Order as well as any regulations proposed by the U.S. Department of Energy on this topic and is experienced in assisting parties in understanding and successfully navigating this regulatory landscape.

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